

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1244-CR

Cir. Ct. No. 2012CT284

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN L. UDELHOFEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.¹ Steven Udelhofen appeals a judgment of conviction for operating a vehicle while intoxicated, as a second offense, in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(a). Udelhofen argues that the circuit court erred in denying his motion to suppress evidence of intoxication obtained from a traffic stop because the officer lacked reasonable suspicion to initiate the stop. For the following reasons, I affirm.

BACKGROUND

¶2 The evidence offered at the suppression hearing consisted of testimony from the police officer who stopped Udelhofen's vehicle and a digital video recording captured by a camera inside the officer's squad car. The officer who stopped Udelhofen's vehicle testified as follows.

¶3 On a Friday at around 8:20 p.m., the officer was on duty and in a squad car, travelling northbound on Lueders Road approaching U.S. Highway 12. At that time, Udelhofen's vehicle² caught the officer's attention by making a left-hand turn off of Highway 12 onto Lueders Road at what appeared to be too fast a speed. The officer estimated that he was approximately one to one-and-a-half blocks away from Udelhofen's vehicle when he observed this turn.

¶4 As to the nature of this first turn, the officer testified that he did not know the exact speed but "it appeared" that Udelhofen's vehicle "did not slow down enough to safely make" the turn. Expanding on this idea during cross-examination, the officer said that he thought that Udelhofen was driving at an "unreasonable and imprudent speed," in violation of WIS. STAT. § 346.57, because Udelhofen made the turn onto Lueders Road at a speed "a little high[er]" than "he should have" and lost traction. Regarding the loss of traction, the officer testified,

² There is no dispute that this was Udelhofen's vehicle.

“[a]s the vehicle turned the corner, the rear end of the vehicle slightly swung toward the curb line[,] almost striking the curb and continued northbound.” On cross-examination, the officer clarified that Udelhofen’s vehicle did not actually hit the curb as it turned.

¶5 After this turn, the officer momentarily lost sight of Udelhofen’s vehicle as it continued northbound on Lueders Road. The officer caught up with and followed Udelhofen’s vehicle on Lueders Road, and observed it “having a difficult time driving a nice straight line.” That is, Udelhofen’s vehicle “deviat[ed] back and forth within its own lane,” though never crossing the centerline. As Udelhofen travelled on Lueders Road after turning off of Highway 12, it did not appear to the officer that Udelhofen was speeding.

¶6 Udelhofen’s vehicle then made a right-hand turn signal and slowed down to execute a “wide right-hand turn, crossing over the centerline of the roadway as it turned onto Bates Street.”³ As the vehicle turned onto Bates Street, the officer activated his squad car emergency lights, an action which automatically activates the squad car video to save recorded images from thirty seconds earlier.⁴ Udelhofen’s vehicle continued on Bates Street and, after making a right-hand turn signal, made another “wide right-hand turn” onto Pine Street before stopping. The officer did not observe any reasons why Udelhofen would not or could not have promptly pulled over on Bates Street in response to the emergency lights, instead

³ The officer acknowledged on cross-examination that Bates Street and Pine Street do not bear visible dividing lines separating the two lanes. However, we take this testimony to stand for the idea that Udelhofen’s vehicle crossed over what the officer estimated to be the center point of each street.

⁴ The officer testified that he can also manually activate the video recording, but could not recall if he did so on this occasion.

of continuing onto Pine Street. There were no other vehicles on Bates Street or Pine Street when Udelhofen was driving on those streets. During the stop, in conduct not challenged in this appeal, the officer decided that Udelhofen was intoxicated and arrested him for operating while intoxicated.

¶7 Also during the suppression hearing, in addition to hearing testimony from the officer, the circuit court and the parties viewed the video from the officer's squad car a total of three times. The court also heard testimony from the officer about how well or poorly the officer believed the video images captured what the officer had personally observed. The officer, who had viewed the video before coming to court and then again in the courtroom, testified that it is "difficult to see the vehicle fishtailing" on the video, meaning that the officer found it difficult to confirm from viewing the video images that Udelhofen's vehicle lost traction in making the initial turn from Highway 12. The officer testified that this was because the video portrays Udelhofen's vehicle as if it had been "much further away than it actually was in person."

¶8 When asked by defense counsel on cross-examination if he believed that the video shows Udelhofen's vehicle traveling "in a straight line" on Lueders Road, the officer was interrupted by defense counsel, who abruptly changed the subject:

A. It initially, you know, deviated over to the left, like again it did not cross the centerline, but it did not appear to be driving in a—

Q. And it took you a while to catch up to the vehicle, didn't it?

¶9 As to the officer's testimony, the court found no reason to conclude that the officer misrepresented what he observed. The court specifically credited

the officer's testimony, based in part on his training, seven years of law enforcement experience, and familiarity with the area.

¶10 Specifically, the court found that the vehicle was "sliding" in making the turn onto Lueders Road. The court also made an implicit finding that factors, such as ice or gravel on the road, that might have explained the "sliding" if Udelhofen had been driving safely, were not present. The court found that the "sliding" was "indicative of going too fast to make the turn safely and properly."

¶11 Turning to the impact of the video on these findings, the court determined that, while the video does not corroborate aspects of the officer's testimony, it also does not undermine that testimony. Because of "a little jerkiness to the eye" of the video and the "distance" between the squad car camera and Udelhofen's vehicle, the court concluded that the officer was in the "better position" to observe the vehicle in person than is reflected in the video images. Putting it differently, the court found it "very, very difficult" to rely on the video to draw conclusions either way about key aspects of the officer's testimony.

¶12 Having made those findings, the court concluded that a combination of factors gave the officer reasonable suspicion for the stop: that it was a Friday evening ("[not] Sunday morning at 10 a.m."); the three wider-than-appropriate turns, including most dramatically sliding or "fishtailing" during the first turn; weaving within the lane; and failing to pull over promptly after the officer activated his emergency lights. As to the last point, the court made an implicit finding that the officer had a reasonable basis to suspect that Udelhofen's failure to promptly pull over on an empty street might have arisen from impairment, fear of detection of impairment, or some combination of the two factors. The court also observed, based on the too-fast turn from Highway 12 onto Lueders Road,

that this conduct may have violated either WIS. STAT. § 346.57(2) or (3).⁵ While the officer did not issue a citation for this violation, and the court did not decide whether there was “probable cause to stop for that violation only,” the court found that the combination of factors the officer witnessed established a “reasonable suspicion of impaired driving,” thus, justifying the stop. On this basis, the circuit court denied Udelhofen’s motion to suppress.

DISCUSSION

¶13 An officer may conduct an investigative stop if he or she has reasonable suspicion to believe that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Reasonable suspicion exists where, based on the totality of the circumstances, “the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. The officer’s reasonable suspicion must be

⁵ WIS. STAT. § 346.57 states in pertinent part:

(2) REASONABLE AND PRUDENT LIMIT. No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of a vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care.

(3) CONDITIONS REQUIRING REDUCED SPEED. The operator of every vehicle shall, consistent with the requirements of sub. (2), drive at an appropriate reduced speed when approaching and crossing an intersection ..., when approaching and going around a curve

“grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law.” *State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305 (citation omitted). “However, an officer is not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop.” *Id.*

¶14 Whether a stop is reasonable is “a question of constitutional fact,” which is “a mixed question of law and fact” and is reviewed under a two-step standard of review. *Post*, 301 Wis. 2d 1, ¶8. A circuit court’s findings of historical fact are reviewed under the clearly erroneous standard, but the application of those facts to constitutional principles is reviewed independently of the circuit court. *Id.* Especially pertinent here is the rule that, when evidence in the record on appeal includes disputed testimony together with a video recording that may be viewed by the appellate court, the circuit court’s findings of fact, based in part on that recording, are reviewed under the clearly erroneous standard. *See State v. Walli*, 2011 WI App 86, ¶¶16–18, 334 Wis. 2d 402, 799 N.W.2d 898.

¶15 Udelhofen argues that the officer’s “observations, under the totality of circumstances, do not amount to ‘specific and articulable facts which, taken together with rational inference[s] from those facts, reasonably warrant’ the stop.” More specifically, Udelhofen argues that reasonable suspicion did not exist because the squad car video does not corroborate the officer’s testimony by clearly showing Udelhofen’s vehicle taking the turn onto Lueders Road too fast, “fishtailing,” weaving, or otherwise driving erratically. Udelhofen contends that, because the video does not affirmatively corroborate the officer’s testimony, the circuit court erred in relying on the officer’s testimony in determining that the officer had reasonable suspicion of impairment to justify the stop.

¶16 My review of the squad car video in the record confirms the view of the circuit court. As I view it, the video is too dark and shows the vehicle too far in the distance (that is, shows the vehicle as too small on the screen) to reveal relevant details of Udelhofen’s driving. This is consistent with the circuit court’s finding that the video neither substantiates all of the officer’s testimony regarding Udelhofen’s driving nor undermines any particular aspect of the testimony. Applying our standard of review from *Walli*, this defeats Udelhofen’s apparent argument that the circuit court’s findings are clearly erroneous because they are undermined by or not supported by the video images.

¶17 To the extent that Udelhofen also argues that the facts found by the circuit court do not support a finding of reasonable suspicion, I reject this argument. As summarized above, the following observed events occurred within a very short time frame, on a Friday evening: the sliding or fishtailing⁶ during the first turn, followed by the weaving within the lane, followed by the two wide turns, followed by the failure to promptly pull over in response to the emergency lights. This combination of events in quick succession, and particularly beginning with a visible slide that the court found resulted from turning the corner too fast, easily amounts to reasonable suspicion under *Post*.

⁶ Udelhofen asserts that the officer’s description of the vehicle’s movement as it turned onto Lueders Road does not qualify as “fishtailing.” Udelhofen’s argument appears to be that the rear end of a vehicle does not “fishtail” unless its movement is “significant,” or unless the movement is discernibly “from side to side,” and that neither the video nor the officer’s testimony provided evidence of significant movement or side-to-side movement. However, the circuit court credited the officer’s testimony that the rear end of the car slid to one side, at least to a degree that was clearly visible to the officer from one long city block away, under conditions in which such a slide would not have occurred absent excessive speed. Regardless of any terminology Udelhofen might prefer to use for this sliding concept, he fails to persuade me that the court’s factual finding was clearly erroneous, or that this finding cannot count as one indication of impaired driving.

CONCLUSION

¶18 For these reasons, I conclude the circuit court’s findings of fact were not clearly erroneous and that the officer had reasonable suspicion of impairment to justify the stop based on these findings. Thus, the circuit court did not err in denying Udelhofen’s motion to suppress evidence. Accordingly, I affirm the judgment of conviction.⁷

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁷ Udelhofen’s briefing contains two troubling inaccuracies.

The reply brief wrongly characterizes the point at which Udelhofen’s vehicle allegedly weaved within its lane. The brief then states, “In its findings the trial court did not even address the alleged weaving nor did it factor into its decision.” To the contrary, in the course of its fact finding the court explicitly noted that the officer testified to seeing the car weave on Lueders Road and then proceeded to explain why the court credited this testimony, even if the weaving was not evident from the video.

The reply brief also states, “The court further specifically found that there was not probable cause to make a stop for a violation of unreasonable and imprudent speed” What the court stated on this issue was: “Now, this isn’t to say that there was probable cause to stop for that violation only,” after which the court proceeded to cite reasons to credit the officer’s testimony. The court plainly put the probable cause issue to the side and did not make the “specific[]” finding alleged in the reply brief.

I am not in a position to suggest that these inaccuracies arise from an intent to mislead the court. Moreover, the result of this appeal would be the same with or without these inaccuracies. However, I remind counsel that zealous advocacy is still accurate advocacy.

